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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195.

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

VS.

W. J. MILLER, STATE TAX COLLECTOR.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

W. H. WATKINS,
A. E. GARDNER, Sr.,
R. C. STOVALL,
A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Petitioners.

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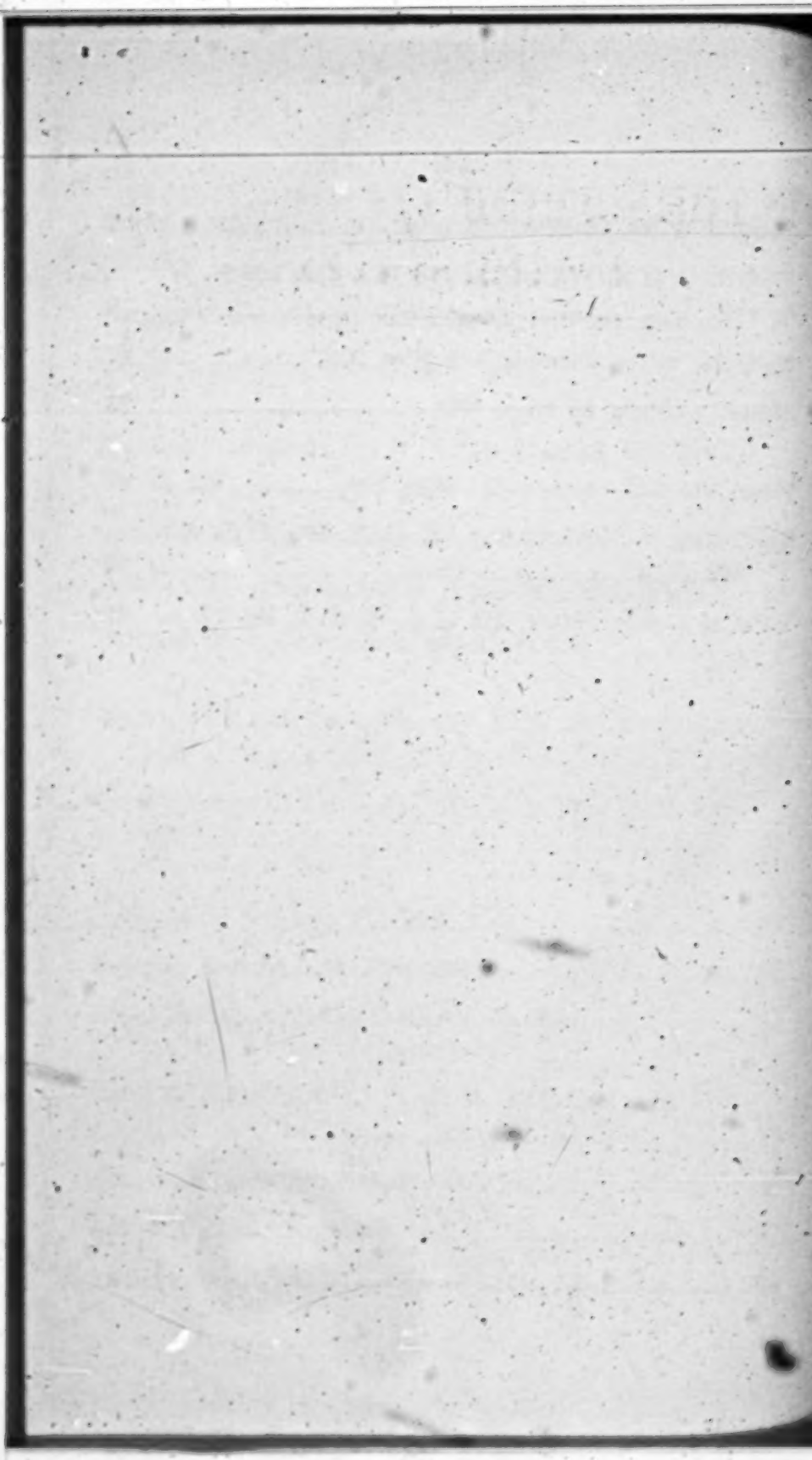

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195.

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL., VS. W. J. MILLER, STATE TAX COLLECTOR.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

I. UNCONSTITUTIONALITY OF ACT OF 1914

The brief for appellee makes little effort to contest appellant's contention that the railroad mileage tax for the Mississippi Levee District is void because of denial of equal protection of the laws for the reason that the amount of the tax imposed under the arbitrary mileage rule is greatly in excess of the tax which would be paid by appellant if taxed in the ordinary way on the basis of value and acreage. It stands undisputed that "Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality." *K. C. S. Ry. Co. vs. Road Improvement District* 256 U. S. 658. Appellee makes no effort to distinguish this case. The authorities cited on page 20 of the brief for the appellee, to establish the proposition that railroads may be put in a special class and taxed on a mileage basis are all based on the assumption that the amount of

the mileage tax is not greater than the amount which the railroad company would have had to pay if railroad property had not been placed in a special class. In *Pullman Company vs. Richardson* 261 U. S. 330, 339, the special tax on railroads was justified because it was "not in excess of what would be a legitimate tax on such property valued as part of a going concern, nor relatively higher than taxes on other classes of property." In *Great Northern R. R. Co. vs. Minnesota* 278 U. S. 503, 509 the special railroad tax was sustained because, the court said, "we find nothing in the record to indicate that the tax under consideration plus that already collected exceeds 'what would be legitimate as an ordinary tax on the property valued as part of a going concern, (or is) relatively higher than the taxes on other kinds of property' ". In *General American Tank Car Co. vs. Day* 270 U. S. 367 it was affirmatively found that the tax involved was the substantial equivalent of the ordinary local taxes. The brief for appellee wholly ignores the vital fact that the amount of this mileage tax at $350.00 per mile is 70 times greater than this appellant would pay if taxed as other taxpayers in the district, and even if the tax is reduced in accordance with the amendment of 1926 to $50.00 per mile still that amount is ten times as great as would be paid by this appellant if taxed as other property in the district. Appellee further ignores the fact that this discrimination is not the result of an accidental misfortune of this particular railroad but that the mileage tax is unequal and grossly discriminatory as to all railroads in the district. The only other railroad in the district is The Yazoo & Mississippi Valley Railroad which if taxed on the ordinary basis

of value and acreage, as other property in the district, would pay less than half the amount of the arbitrary mileage tax. In this situation the tax clearly comes within the rule expressed in *Holden vs. Hardy* 169 U. S.366, 398. "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class." It is obvious that the railroad mileage tax at the present rate, when compared to the taxes imposed on other property in the Mississippi Levee District results in unjust discrimination, oppression and the spoliation of railroads. It is such taxation as this which forced this railroad property into a federal receivership from which it emerged in 1923.

Appellee says that the Mississippi constitution recognizes the mileage tax and expressly approves it, as was stated by the Supreme Court of Mississippi at the hearing of this case in the lower court. But they again overlook the question of the amount of the mileage tax as compared with ordinary taxation. The Supreme Court of Mississippi also ignored the question of the amount of the mileage tax. At the time the constitution of 1890 was adopted the mileage tax was fixed by the Act of 1886 at $100.00 per mile for main trunk lines and $60.00 per mile for branch or feeder lines, and at that time the rate of taxation on other property in the Mississippi Levee District was fixed by the Act of November 27, 1865, as amended January 27, 1877 and February 25, 1878, at 5 mills on the dollar and the cotton tax at 2/5 of 1c per pound. By a gradual process the tax burden has been shifted so that the ad valorem tax was 4 mills

for 1926 and 5 mills for 1927, substantially the same rates in force when the constitution of 1890 was adopted; the cotton tax and the acreage tax were substantially the same, but the railroad mileage tax had been increased arbitrarily to 3½ times the original amount, and this in defiance of the spirit of the Mississippi constitution which states, referring to levee taxes, that "all reductions in such taxations shall be uniform." The Mississippi constitution authorizes the legislature to tax railroads for levee taxes on the mileage basis, but it does not authorize such a high rate per mile as to result in arbitrary discrimination and spoliation.

Appellee says that the Mississippi Levee District is not the only local improvement district which taxes railroads on the mileage basis. They mention in their brief that the Mississippi Delta region is divided into two levee districts, one of which is called the Mississippi Levee District and the other the Yazoo Mississippi Delta Levee District, but they do not mention the fact that in the Yazoo Mississippi Delta Levee District it has never been the practice to put railroads in a special class. In that district railroads are taxed on the ad valorem basis and the acreage basis like other property and are also subject to a moderate license tax for the privilege of carrying on intra-state business varying from $10.00 to $90.00 per mile according to the class of railroad, just as all other businesses carried on in the Yazoo Mississippi Delta Levee District are subject to occupation taxes, and that these license taxes both for railroads and other businesses are state wide. See Chapter 158 Laws of Mississippi 1884 Sction 14 and Chapter 80 Acts of 1902.

Appellee mentions several Louisiana levee districts which tax railroads on a mileage basis. We need go no further than the facts stated in appellee's brief to show that they give no comfort to appellee in this case. On page 16 of the brief for appellee it is stated that The Atchafaylaya Basin Levee District raises its revenues by a tax of $60.00 per mile of railroad main line in said district, an ad valorem tax of 10 mills on all property except railroads and a tax on cotton, sugar and other produce. Compare those rates with the amounts which appellee here endeavors to defend. There the ad valorem tax rate was 10 mills as compared with the railroad mileage tax of $60.00 per mile. In the present case the ad valorem tax is 4 mills for 1926 and 5 mills for 1927 and the railroad mileage tax $350.00 per mile. The brief for appellee, on the same page states that The Pontchartrain Levee District of Louisiana has a railroad mileage tax of $100.00 per mile, but does not state the amount of the other taxes with which it must be compared. On page 17 of said brief it is stated that in 1904 the State of Louisiana created the Red River and Bayou Desglaizes Levee & Drainage District with a revenue system which taxed property, except railroads, on the ad valorem basis at the rate of 10 mills, and included an acreage tax of 5c and a mileage tax on railroads at $60.00 per mile; and that in 1928 the acreage tax was increased to 25c and the mileage tax to $100.00 per mile. In 1928, therefore, this levee district had an ad valorem tax of 10 mills, an acreage tax of 25c per acre and a railroad mileage tax of $100.00 per mile. Compare these rates with those which appellee attempts to defend for the Mississippi Levee District where the ad valorem tax

paid by all other property owners, except railroads, is at the rate of 5 mills, one-half the Louisiana rate; the Mississippi acreage tax is 5c per acre (this is the maximum allowed by the state constitution) one-fifth the Louisiana rate; and the mileage tax on railroads is $350.00 per mile or 3½ times the Louisiana railroad mileage rate. It is obvious that either the Louisiana legislators must be guilty of gross discrimination in favor of railroads, or else the Mississippi legislators are guilty of gross discrimination against railroads. When we figure the aplication of these taxes it is clear that it is Missisippi which has become guilty of discrimination. An ad valorem tax at the rate of 5 mills on a railroad valued at $20,000 per mile would produce only $100.00 per mile in taxes. The record shows that of the two railroads in Mississisppi Levee District one of them is assessed as high as $32,000 per mile and the other as low as $1,000 per mile. It is to be presumed that these assessments are fairly and honestly made in the same proportion of true value as other property in the district. It is an inherent defect of an arbitrary railroad mileage tax, in a district where the railroads are of greatly unequal value, that it must necessarily unduly favor one railroad or unduly discriminate against the other.

The brief for appellee makes the further contention that if the railroad mileage tax is unconstitutional the cotton tax is also unconstitutional, and that the entire system of taxation used in the Levee District must be unconstitutional. (Brief for appllee page 18). In view of the facts in the case such a contention seems as absolute *non sequitor*. The unconstitutionality of the railroad mileage tax arises

from its excessive amount. The legislature of Mississippi was not content to leave the mileage tax at $100.00 per mile as fixed in 1886. The general plan of taxation in the Mississippi Levee District is set out in Chapter 156 Mississippi Laws of 1896 imposing an acreage tax of 5c, an acre, an ad valorem tax of 5 mills on all property real and personal in the district, and a cotton tax of 1/5 of 1c per pound. In 1908 the Act of 1896 was amended so as to authorize increases in these rates and at the same time the railroad mileage rate was increased from $100.00 per mile to $200.00 per mile. In 1914 the Act of 1896 was again amended so as to authorize increases, and the railroad mileage tax was again increased in proportion. Subquently the other taxes were greatly reduced without any reduction in the railroad mileage tax thereby creating the gross inequality against which we seek protection. The validity of the acreage tax was sustained by the Supreme Court of Mississippi in the case of *Smith v. Willis* 78 Miss. 243 where the taxpayer objected that his land was above flood waters and could not be benefited by the levees. The Supreme Sourt of Mississippi said: "The doctrine of comparative benefits and graduation of levee tax servitudes does not apply to the Mississippi Levee District". The constitutionality of the cotton tax was sustained by the Supreme Court of Louisiana in the case of *Excelsior Planting & Mfg Co v. Green* 39 La. Ann. 455, 1 Sou. 873, at page 880. If the legislature of Mississippi, by putting railroads in a class to themselves for levee tax purposes, imposed an arbitrary mileage tax on them at an excesively high rate, and if the Supreme Court of Mississippi is within its rights in refusing to permit the legislature to classify railroads so as to relieve this appellant of some

of the discrimination against it, then they must bear the responsibility for having the entire railroad mileage tax declared unconstitutional and void; and the result of such invalidity would obviously be that railroads would be taxed in the Mississippi Levee District as all other property on the basis of value and acreage. Under the present plan of taxation the most valuable cotton mill in the Mississippi Delta was taxed for levee purposes for the years 1926 and 1927 at the rate of 4 mills or 5 mills on its assessed valuation plus a tax of 5c per acre. Railroad property in the levee district is entitled to the same treatment.

The chief reliance of counsel for appellee on this point seems to be their contention that the Columbus & Greenville Ry. Co. is estopped to contest the validity of this tax because that corporation was organized in 1923 after the railroad mileage tax had been in existence for many years. To support this contention they cite four cases. The case of *Hines Co. v. Guillot, Sheriff*, 153 La. 319, 95 Sou. 749 held that the plaintiff company was estopped to contest the validity of the acreage tax of 10c an acre for levee purposes on the authority of *Duffy v. Peneguy* 148 La. 407, 87 Sou. 25. In the latter case the defendant was held estopped to contest the validity of a tax sale, where land was sold for levee taxes, because he had stood by while the land was being sold without warning the purchaser, and because he himself had bought the land at a prior sale for similar taxes so that if the tax should have been held void not only the plaintiff's title but also the defendant's title would have been invalidated. In *State v. C. & N. W. Ry. Co.* 128 Wis. 449, 108 NW 594 the court held that in Wisconsin privilege taxes are not based on

the power of taxation but are based on a contractual obligation; that a company which exercises a privilege by authority of the laws of Wisconsin is under a contractual obligation to pay the privilege tax imposed for that franchise. The case of *Ford v. Delta Pine & Land Co.* 164 U. S. 662 cited by counsel for appellee has absolutely no application in this connection, and did not involve in any way the doctrine of estoppel. It involved the principle of stare decisis.

Whatever may be said as to the validity of the reasoning in those cases, on their peculiar facts, it is evident that in the present case there are none of the elements of the doctrine of estoppel. The doctrine of estoppel is based on well defined priciples. The person estopped must have acted or spoken or failed to act, or failed to speak, under such circumstances as to mislead another person to his injury, so that it would be inequitable to allow a change of position. The present case is more nearly like that described by the Supreme Court of Louisiana in *Morgan, etc. Co. v. Aucoin* 140 La. 768, 73 Sou. 859 where the court said that the mere fact that the plaintiff railroad company had paid the levee tax from 1908 to 1914 at exactly the same rate "could not possibly be good ground for continuing to pay it". The decision of the lower court was reversed. In *K. C. S. v. Ogden Levee District* 15 *F.* (2d) 637 (affirmed again 39 F. (2d) 884) it was held that the mere fact that the railroad company had paid the levee tax for a number of years without protest during which time bonds had been issued by the levee district did not create an estoppel.

It is true that the present appellant the Columbus & Greenville Ry. Co. was organized in 1923 for the purpose of

buying and operating the Columbus & Greenville Railway. But it is also true that the railroad now known as the Columbus & Greenville Railway was constructed in the Mississippi Levee District many years ago when the railroad mileage tax rate was much smaller than the present rate. If the original owners had not been driven into a receivership they would probably have still owned the property and would under the two cases cited next above have lost none of their rights to contest the validity of this tax. It is unreasonable to hold that the forced sale of the property by reason (among other causes) of the burden of excessive taxation, should cause a loss of the right to contest the validity of such taxation. Furthermore, the burden of proof is on those pleading estoppel to prove the facts on which it is based. There is nothing in this case to prove the rate of ad valorem taxation in the Mississippi Levee District during the year 1923 when the Columbus & Greenville Ry. Co. was organized. The invalidity of the mileage tax, we repeat, arises because of its excessive burden when compared with the tax burdens borne by other property owners in the district. As was said by the court in the Ogden Levee District cases 15 F. (2d) 637 and 39 F. (2d) 884 these levee taxes are assessed anew each year and the validity of the tax for each year constitutes a separate question. The railroad mileage tax at any given rate might be valid for one year where the taxes on other properties in the district were substantially equal, and the same railroad mileage tax might be invalid the following year because of great reductions made in other taxes without reducing the railroad mileage tax.

REPLY TO THAT PORTION OF RESPONDENT'S BRIEF RESPECTING CONSTITUTIONALITY OF THE ACT OF 1926 AS APPLIED TO THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the case of *Clarke v. Maxwell*, (N. C.) 150 S. E. 190, the court had under reveiw a statute imposing a privilege tax for operation of motor vehicles, etc., between termini exceeding fifty miles. The statute was in the following language:

> "Every person, firm, or corporation, their lessees, trustees receivers, engaged in the business of operating automobiles or other motor vehicles, trucks, tractors, trailers, or semi-trailers, for the transportation of property over the public highways of this State for compensation between termini for a distance of greater than fifty (50) miles, either upon call, prearrangement, contract, lease, or other arrangement, shall apply for and procure from the Commisioner of Revenue a State license for the privilege of engaging in such business and shall pay for such license an annual tax as follows:
>
> "For each such motor-propelled vehicle, truck, tractor, trailer, or semi-trailer of a rated carrying capacity of less than three tons, at the rate of forty-five dollars ($45) per ton.
>
> "For such motor-propelled vehicle, truck, tractor, trailer, or semi-trailer of a rated carrying capacity of three tons or over at the rate of seventy-five ($75) per ton."

The Supreme Court of North Carolina held that the

Act was a proper classification, using the following language:

> "Upon this principle, the classification made by the General Assembly of this state for purposes of taxation of persons, firms, or corporations engaged in the business of operating motor-propelled vehicles, for the transportation of property on the public highways of the state, for compensation, must be sustained. All persons, firms, or corporations engaged in such business are required to pay a license tax. None are exempt. The amount of the tax is determined by the class in which each person, firm, or corporation is included. The distinction between those who transport property over the public highways of the state, for compensation, between termini which are less than 50 miles distant from each other (subsection 2, Par. 165, c. 345, Pub. Laws 1929), and those who transport property over said highways also for compensation sometimes between termini which are less, and sometimes between termini which are more, than 50 miles distant from each other, dependent upon the contract with each customer (subsection 3, Par. 165, c. 345 Pub. Laws 1929), is, we think, reasonable and not arbitrary. The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business only. The service furnished by the state to the former is less expensive than the service furnished to the latter. It cannot be said that it is unjust for the state to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the state. We cannot hold as a matter of law that classification made in this instance by

the General Assembly is void, for that the line separating the two classes is arbitrary.

"It has been held in numerous cases by the Supreme Court of the United States, whose decisions are authoritative with us upon the question as to whether the statute involved in the instant case is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, that the provisions of said section do not forbid clasifications by the state of subjects of taxation, and that the power of the state to clasify for purposes of taxation is of wide range and flexibility, subject only to the limitation that the calssification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 48 S. Ct. 423, 72 L. ed. 770, and cases cited. In *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 30 S. Ct. 578, 580, 54 L. ed. 883, it is said: 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, business, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection of clasification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

The last above-mentioned case was reviewed by this Court in *W. C. Clarke Appellant, vs. A. J. Maxwell, Commisioner etc.*, No. 52 on the docket of this Court October

Term 1930. The judgment of the Supreme Court of North Carolina was affirmed by this court with memorandum opinion wherein this Court cited *Carley & Hamilton vs. Snook*, 281 U. S. 66, 74 L. ed 704, 68 A. L. R. 194, 50 S. Ct. 204; *Packard vs. Branton* 264 U. S. 140, 68 L. ed. 596, 44 S. Ct. 257; *Clark vs. Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 S. Ct. 382 (Reported in Advance Sheets, 75 L. ed. 262, 282 U. S. ——.) This decision is decisive of the present case.

Counsel cites *A. & P. Téa Company vs. Daughton*, 144 S. E. 701, 196 N. C. 145. It is interesting to note that the Supreme Court of North Carolina distinguished that case in the case of *Clarke vs. Maxwell*, Supra, in the following language:

> "The distinction between the statute involved in this case and the statute which we held void in *Great Atlantic & Pacific Tea Co. vs. Daughton*, 196 N. C. 145, 144 S. E. 701, is, we think, obvious. The classification made, as contended by the defendant in that case, was not founded upon any reasonable or substantial ground. That statute also unjustly discriminated between the plaintiffs who owned and operated six or more stores, all of which were taxed, and other merchants, who owned and operated five or less stores, all of which were exempt from the tax imposed by the statute upon plaintiffs.

Appellee likewise cites *Louisville & Gas Electric Company vs. Coleman*, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770. In that case this Court held that the classification of mortgages for purposes of taxation upon the basis of the maturity of the indebtedness secured by the mortgage was

arbitrary and void. That case is clearly distinguishable from the one under discussion.

Appellee also cites *Cotting vs. Goddard*, 183 U. S. 79, 46 L. ed. 92. The Court in that case did not have under review a taxing statute but upon the other hand before it a a law dealing with the police of the state to legislate for the well-being of the people thereof. The Court held under the facts in that case that a classification based upon the numbr of cattle received at the stockyards was arbitrary and afforded no reasonable basis for classification. The statute in that case restricted the charges which should be made by certain corporations for receiving and selling live stock; whereas no similar charge was made on other corporations engaged in a similar line of business. In the present case, however, we have demonstrated that the Columbus and Greenville Railroad Company was of inferior construction, incapable of rendering the same class of service as the Yazoo & Mississippi Valley Railroad Company; that it could not possibly receive the same degree of benefit and protection from the levee system as could the Yazoo & Mississippi Valley Railroad Company. This statement alone would justify the classification. It must be borne in mind, however, that in matters of taxation the Legislature of a State has a broader power of classification.

In the case of *Citizens Telegraph Company vs. Fuller*, 229 U. S. 322, 57 L. ed. 1206, this Court used the following language:

> "It may therefore be said that in taxation there is a broader power of classification than in

some other exercises of legislation. There is certainly as great a power, and the rule appellant urges can not be adopted. It is inconsistent with the principle of classification and the cases which have explained the principle and the range of its legal exercise."

Appellees' counsel cite the case of *Fiscal Court of Owen County vs. S. & A. Cox Company* (Ky.) 117 S. W. 296, 21 L. R. A. 283, wherein a tax of $75.00 on a three-horse wagon operating for business and a tax of $200.00 on each four-horse wagon operated for business, was held to be arbitrary. It must be remembered, however, that in the present case petitioner has offered undisputed proof tending to show that the Columbus & Greenville Railway Company, Petitioner, owing to the many differences to which the attention of the Court has been directed, required different classification from that of the Yazoo & Miss. Valley Railroad Company; and that the Act of 1926, now under review, was passed by the legislature of the State of Mississippi, for the purpose of removing the discrimination which the evidence in this case shows the petitioner suffered under the Acts of 1914.

The last above-mentioned case contained no such statement of facts.

Other cases cited by Respondents' counsel will readily distinguish themselves by the application of the foregoing principles.

EFFECT OF THE CLASSIFICATION CRITICISED BY RESPONDENT

Counsel argue that the act of 1926 placing a tax of $50.00 per mile on the Columbus and Greenville Railway Company within the district discriminates against the Yazoo and Mississippi Valley Railroad Company. (a) Counsel states that a narrow gauge railroad company would have to pay $87.50 per mile for the privilege of operating its line in the district, whereas the petitioner would pay $50.00. There are a number of replies to this contention: one which we deem sufficient is that the record with exhibits undisputedly shows that there are no narrow gauge lines of railroad in the district. The court will find attached to the record and briefs a map showing the railroad mileage in the Mississippi levee district. A comparison of this map with the classification (R. 43) and the appendix to petitioner's original brief on page 44 will demonstrate that the only two railroads in the district and the only two which were in the district at the time the act was passed, were the Yazoo and Mississippi Valley Railroad and the Columbus and Greenville Railway, neither of which are narrow gauged roads. There will be no dispute upon this question. This contention was therefore foreclosed adversely to the respondent in the case of *Crescent Cotton Oil Co. vs. State of Mississippi*, 257 U. S. 129, 66 L. ed. 166, wherein the court used the following language:

> "The record before us shows that before the law assailed was enacted, cotton gins had been operated in Mississippi by individuals as well as by corporations, but there is no showing that oil mills

and cotton gins were both operated by an individual or by groups of individuals."

The case of *Pullman vs. Knott*, 235 U. S. 23, 59 L. ed. 105, is directly in point.

(b) Counsel point out that there are in the levee district, as indicated on the map, several feeder or branch lines of the Yazoo and Mississippi Valley Railroad Company which are required under the terms of the act to pay $210.00 per mile. There are a number of obvious replies to this argument. (1) Petitioner is entitled to have the validity of the act of 1926 in respect to the 14th amendment measured by a comparison with the main line of the Yazoo and Mississippi Valley Railroad Company. It is, of course, elementary that strict scientific accuracy in matters of classification are not required.

In the case of *Mutual Loan Co. vs. Martell*, 56 L. ed. 175 (222 U. S. 225), this court said:

> "Legislation cannot be judged by theoretical standards: it must be tested by the concrete conditions which induced it."

And again the court said:

> "We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion."

In the case of *Dominion Hotel vs. State of Arizona*, 249 U. S. 265, 63 L. ed. 597, the court used the following language:

"The 14th Amendment is not a pedigogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the state 'may be determined by degrees of evil, or exercised in cases where detriment is specially experienced.' *Armour & Company vs. North Dakota*, 240 U. S. 510, 517, 60 L. ed. 771, 776, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. It may do what it can to prevent what is deemed an evil, and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co. vs. Shaw*, 248 U. S. 297, 303, ante, 255, 258, 39 Sup. Ct. Rep. 125. Of course, this is especially true when local conditions may affect the answer, —conditions that the legislature does, but that we cannot, know. *Thomas Cusack Co. vs. Chicago*, 242 U. S. 526, 530, 61 L. ed. 472, 475, 476, L. R. A. 1918A, 136, 37 Sup. Ct. Rep. 190, Ann. Cas. 1917C, 594."

(2) It is only necessary that uniformity exist as to persons in the same class. The act divides, as is conceded in respondent's brief, railroads into four classes: (1) Narrow gauge railroads; (2) feeder of branch lines; (3) standard

main lines, more than 25 miles in length; (4) Main lines not exceeding 25 miles in length. In other words, main lines are divided into two classes: those exceeding 25 miles and those which may not exceed such distance. Branch or feeder lines are in an entirely different class from that of the petitioner.

In the case of *C. & O. Ry. Co. vs. Atty.-Genl.*, 230 U. S. 513, 57 L. ed. 1597, the court used the following language:

> "If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

In *Clark vs. Titusville*, 184 U. S. 329, 46 L. ed. 569, the court used the following language:

> "Manifestly there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment to the Constitution of the United States; and the reasoning by which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes."

Other cases directly in point are *Balls Gap R. R. Co. vs. Pa.* 134 U. S. 232, 33 L. ed. 892; *C. B. & Q. Ry. Co. vs. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Lowe vs. Kansas*, 163 U. S. 8, 41

L. ed. 78; *Fort Smith L. & T. Co. vs. Paving District*, 274 U. S. 387, 71 L. ed. 1112; *Quaker City Cab Co. vs. Pa.* 277 U. S. 389, 72 L. ed. 770.

There are only two standard gauge main lines of railway in the levee district, and as to whether or not the act of 1926 is discriminatory, such discrimination must be determined by a comparison with the main line of the Yazoo and Mississippi Valley Railroad Company. By reference to the classification of railroads in Mississippi had by the Railroad Commission of the state (R. 43), the Columbus & Greenville Railway Company is the only main line railroad in the state of Mississippi classed as number three, and the supreme court of the state of Mississippi has decided that this classification is binding upon it. *R. R. Co. vs. State*, 110 Miss. 290, discussed in original brief p. 25. As a matter of fact the Road from Rosedale to Dockery is not a branch line, but a main line, classified by the Miss. Railroad Commission as a No. 2 Main line (R. 43).

(3) Again, these branch lines of the Yazoo and Mississippi Valley Railroad Company, referred to, are feeders for and form part of the great Yazoo and Mississippi Valley system. An examination of the map attached to petitioner's original brief shows that the Yazoo and Mississippi Valley system, with its main lines and branches, thoroughly covers the levee district, north and south. A classification based upon a main line not exceeding 25 miles in length, under the facts and circumstances in this case, and a branch or feeder line forming part of a great trunk line system, rests upon an entirely rational difference, and the classification would be justified by that difference alone. We are attach-

ing as Appendix No. 1 to this brief the cotton production in the state of Mississippi during the years 1928 and 1929. An inspection thereof reveals the fact that in the year 1929 the counties comprising the territory in which this levee district is situated produced approximately 375,000 bales of cotton. This was more than one-fifth of the total production by the state of Mississippi, almost as much cotton as was produced in the entire state of Tennessee, approximately half as much as was produced by the state of Louisiana. This territory forming the delta of the Yazoo and Mississippi rivers is one of the most fertile spots in the world. The Yazoo and Mississippi Valley Railroad Company, with its main lines and branches, traverses it in every direction. Upon the other hand, the Columbus and Greenville Railway Company runs at right angles from the river and operates for the most part, after leaving the levee district, through a hilly and non-productive section of the state of Mississippi. It necessarily appears not only that it was proper to place the Columbus and Greenville Railway Company, the Yazoo and Mississippi Valley and its branches in a different classification, but fairness would require that this be done.

(4) Respondent's counsel (p. 25 of brief) makes the statement that the petitioner filed a statement with the Interstate Commerce Commission for the purpose of fixing rates at a valuation of $38,000 per mile. It is sufficient to say that there is nothing in the record to disclose any such statement. At R. 56 is a tentative valuation as of June 30, 1915, of the property of the Southern Railway Company in Mississippi, the predecessor in title to Petitioner. The tentative valuation dealt with a main line of 179 miles, where-

as the main line of the petitioner is 169 miles. Besides, the tentative valuation included 58,353 miles of branch lines and 59,508 miles of yard tracks and sidings, and necessarily included property of every kind, including the yard facilities, terminals at Columbus, Mississippi, and other properties. The question of valuation for the purpose of rate-making rests upon a different basis than that of taxation. Upon the question of rate-making the matter of cost of reconstruction is entitled to a very great weight. *St. L. & O'Fallon Ry. vs. United States of America*, 73 L. ed. 798, 279 U. S. 461. When we approach the matter of taxation, however, the question involved is one of uniformity.

In the case of *Robert L. Green vs. L. & I. R. R. Co.* 244 U. S. 499, 61 L. ed. 1280, it is held that property is assessed at its full value whenever it is uniformly assessed, like other property.

In the case of *Knox, Atty-Genl. vs. Southern Paper Co.* 108 So. 288, 143 Miss. 870, the supreme court of the state of Mississippi used the following language, laying emphasis upon the importance of uniformity in questions of taxation:

> "But under the equality clause of the Fourteenth Amendment of the Federal Constitution as construed by the supreme court of the United States, if in assessing property for taxes either the requirement that it be assessed at its true value, or the requirement that its assessment shall be uniform and equal, is sacrificed, it must be the former and not the latter."

Even if it be true, however, that the property of petitioner in its entirety was of the value stated and it produced a revenue of $159,392.08 in the year 1925, this was a yield slightly more than three per cent with value of the company's property as fixed by the Commerce Commission. It undisputedly appears, however, from the record in this case that the property of the Yazoo and Mississippi Valley Railroad Company, when assessed in accordance with uniform rules, which are assumed to prevail in the state of Mississippi, is assessed at and is therefore valued at thirty-two times as much as that of the petitioner, which would of itself not only justify the classification but require entirely a different basis of classification for taxation. Taxation is not a matter of theory: it is a practical proposition. Under the act of 1926 we have a legislative declaration as to the proper contribution which the Columbus and Greenville Railway Company should make towards the maintenance of the local improvements in the district consisting of levees along the Mississippi river. Therefore, the burden of proof rests upon the respondent to prove by competent evidence that the legislative declaration is arbitrary and discriminatory. See case of *Memphis & Charleston R. R. Co. vs. Pace*, decided Jan. 1, 1931, Advance Sheets, 75 L. ed. 178, 281 U. S. ——. Respondent not only offered no proof in respect thereto, but successfully maintained the position before the supreme court of the state of Mississippi that no evidence upon the subject was competent or would affect the result.

(5) Referring again to the position of respondent's counsel that certain branches of the Yazoo and Mississippi Valley Railroad Company are discriminated against under

the act of 1926 now under review, in addition to what we have above stated in reply to this argument, we state that the Yazoo and Mississippi Valley Railroad Company is not objecting thereto, has not complained of the discrimination, and the respondent occupies no relation which entitles him to urge the point. *Hebring vs. Claire A. Lee*, 280 U. S. 111, 74 L. ed. 217; *Thomas Cusack Co. vs. Chicago*, 242 U. S. 526, 61 L. ed. 472; *Hooker vs. Burr*, 194 U. S. 415, 48 L. ed. 1046; *Flint vs. Stone-Tracy Co.* 220 U. S. 107, 55 L. ed. 389.

DECISION DOES NOT REST ON QUESTION OF STATE LAW.

The Supreme Court of the state of Mississippi did not base its decision upon any construction of the constitution of the state of Mississippi. Upon the other hand, without reference to the constitution of the state of Mississippi, it held that the act in question violated the fourteenth amendment to the constitution of the United States, and, therefore, was void upon its face. The rule contended for by opposing counsel has no application except where the decision of the state court is put upon a federal and a non-federal ground, and if the non-federal ground is broad enough to sustain the judgment, this court will not review the federal question. See *McCoy vs. Shaw*, 277 U. S. 302, 72 L. ed. 891, and cases therein cited. In the case of *Illinois Central v. Messina*, 240, U. S. 395, 60 L. ed. 709, this court held that wherever the supreme court of the state thought it necessary to construe a federal act, it indicated that such construction was material to the result. So in this case, the supreme court of the state of Mississippi did not mention the state constitution but expressly put its decision upon the four-

teenth amendment to the federal constitution, it conclusively indicated that the supreme court of the state of Mississippi thought such construction necessary to reach the result which it did. The decision of the supreme court of the state of Mississippi legally amounts to the announcement that in so far as the constitution of the state of Mississippi was concerned, the act of 1926 did not violate any portion thereof. Section 14 of the Bill of Rights of the state of Mississippi contains the following language:

> "No person shall be deprived of life, liberty or property except by due process of law."

There is no provision, however, prohibiting a denial of the equal protection of the law. The provision is patterned after the fifth amendment to the constitution of the United States, which is controlling upon congress while the fourteenth amendment to the constitution of the United States, is applicable only to state legislature. *Hodges vs. U. S.* 203 U. S. 1, 51 L. ed. 61; *Twining vs. New Jersey*, 211 U. S. 78, 53 L. ed. 97; *Thorington vs. Montgomery*, 147 U. S. 490, 37 L. ed 252. The fourteenth amendment to the constitution of the United States prohibits deprivation of property without due process of law by a state, as well as the denial of the equal protection of the law, whereas the fourteenth section of the bill of rights of the state of Mississippi deals only with deprivation of property without due process of law, which has a fixed meaning in the jurisprudence of this country. *Civil Right Cases*, 109 U. S. 3, 27 L. ed. 835; *Simon vs. Craft*, 182 U. S. 427, 45 L. ed. 1165; *Hovey vs. Elliott*, 167 U. S. 409, 42 L. ed. 215. To be deprived of the

equal protection of the law means all persons are not treated alike under the same circumstances. *Leefer vs. Texas*, 139 U. S. 462, 35 L. ed. 225. *Waker City Cab Co. vs. Pa.*, 277 U. S. 389, 72 L. ed. 927.

Counsel for respondent call attention to the fact that in the state court they urged upon the supreme court of the state of Mississippi that the act of 1926 violated section 234 of the Mississippi constitution, which is found on page 36 of counsel's brief. The constitutional provision prohibits the passage of any law affecting the taxation or revenue in a levee district unless and until the act shall have been published as required therein. This was the constitutional question urged before the supreme court of the state of Mississippi. It had been thoroughly settled, however, by the supreme court of the state of Mississippi in a long line of cases that the court could not look beyond the enrolled bill passed by the legislature to determine as to whether or not such notice had been published. The leading case upon the subject from the supreme court of Mississippi was *Ex Parte Wren*, 63 Miss. 512. The case was referred to with approval by this Court in the opinion of Mr. Justice Harlan in *Marshall Field & Co. vs. Clark*, 134 U. S. 649, 36 L. ed. 294. Other cases from the supreme court of Mississippi directly in point are *State Ex Rel vs. Jackson*, 119 Miss. 729, *Adams, Rev. Agt. vs. Noble*, 103 Miss. 393, *Postal Telg. Co. vs. Shannon*, 91 Miss. 476, *Hunt vs. Wright*, 70 Miss. 307, *Swan vs. Buck*, 40 Miss. 269, *Riley vs. Ammon*, 143 Miss. 861, *Royal Ins. Co. vs. Levee Commissioners*, 95 Miss. 168, *Telg. Co. vs. Robertson*, 116 Miss. 204.

We respectfully submit that the judgment appealed from should be reversed.

W. H. WATKINS,
A. F. GARDNER, Sr.,
R. C. STOVALL,
A. F. GARDNER, Jr.,
H. T. ODOM,
Attorneys for Petitioners.

APPENDIX NO. 1.

DEPARTMENT OF COMMERCE, WASHINGTON
COTTON GINNED IN MISSISSIPPI:
CROPS OF 1929 AND 1928

The Department of Commerce, though the Bureau of the Census, announces the preliminary report on cotton ginned by counties, in Mississippi, for the crops of 1928 and 1929. The total for the state was made public Thursday, March 20, 1930. (Quantities are in running bales. Linters are not included.)

COUNTY	1929	1928
The State	1,875,155	1,462,021
Adams	5,589	4,890
Alcorn	16,207	13,585
Amite	11,062	8,240
Attala	16,132	13,415
Benton	7,646	5,756
Bolivar	168,733	128,043
Calhoun	10,759	8,299
Carroll	11,230	8,691
Chickasaw	19,553	13,091
Choctaw	4,873	4,257
Claiborne	7,674	4,686
Clarke	6,661	5,783
Clay	11,614	8,275
Coahoma	100,417	76,806
Copiah	9,723	7,574
Covington	12,913	12,749
DeSoto	32,232	24,832

Forrest	2,369	2,789
Franklin	3,093	3,008
George	3,407	3,013
Greene	855	679
Grenada	13,963	8,803
Hinds	30,084	25,896
Holmes	52,210	42,871
Humphreys	50,506	37,396
Issaquena	5,387	5,991
Itawamba	10,393	7,384
Jasper	13,214	11,992
Jefferson	9,549	6,698
Jefferson Davis	14,189	11,606
Jones	16,058	13,396
Kemper	11,989	9,988
Lafayette	13,328	9,874
Lamar	3,957	3,173
Lauderdale	15,657	13,045
Lawrence	12,965	10,090
Leake	21,026	17,965
Lee	36,385	25,599
Leflore	110,823	78,899
Lincoln	13,178	10,574
Lowndes	18,584	13,581
Madison	35,465	28,434
Marion	12,103	10,247
Marshall	24,649	16,891
Monroe	26,996	18,018
Montgomery	11,994	10,133
Neshoba	23,804	20,652
Newton	22,200	18,678

Noxubee	20,810	14,428
Oktibbeha	7,353	4,949
Panola	33,650	25,348
Perry	1,823	1,975
Pike	14,138	11,255
Pontotoc	20,061	14,592
Prentiss	15,255	11,874
Quitman	47,167	34,666
Rankin	10,237	8,342
Scott	16,212	12,033
Sharkey	28,550	29,885
Simpson	15,785	12,439
Smith	13,846	11,297
Sunflower	159,775	123,284
Tallahatchie	59,700	47,264
Tate	19,967	16,271
Tippah	22,105	15,956
Tishomingo	11,634	10,739
Tunica	36,917	28,649
Union	17,179	11,712
Walthall	14,502	11,310
Warren	5,645	5,710
Washington	103,495	75,134
Wayne	5,880	4,225
Webster	10,033	8,248
Wilkinson	3,921	4,338
Winston	13,782	11,736
Yalobusha	10,832	8,039
Yazoo	40,772	37,975
All Other	1,035	1,172